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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 48

(Formerly October Term, 1959, No. 756)

SYSTEM FEDERATION No. 91 RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO, Et Al., - - - - - - - - - Petitioners,

versus

O. V. WRIGHT, Et Al., - - - - Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS OTHER THAN LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

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v.

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BRIEF FOR RESPONDENTS OTHER THAN LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The "Opinions Below", "Jurisdiction", and "Statute Involved", as set out on pages 1-4 of brief for petitioners are correctly stated therein. In addition, the case involves Section 2, Third, Fourth, Fifth and Eighth, of the Railway Labor Act, 45 U. S. C., Section 152, Third, Fourth, Fifth and Eighth. These additional provisions of the Railway Labor Act are printed in the appendix hereto.

COUNTER-QUESTIONS PRESENTED.

1. Did the District Court abuse its discretion in refusing to modify the injunction?

2. Did the District Court, in refusing to modify the injunction, depart from the rule enunciated in *United States* v. *Swift & Co.*, 286 U. S. 106, 76 L. Ed. 999?

3. Did petitioners meet the burden of proof of showing, as a result of the 1951 Amendment to the Railway Labor Act, a grievous wrong evoked by new and unforeseen conditions?

4. Did the 1951 Amendment to the Railway Labor Act alone entitle petitioners, as statutory bargaining representatives previously enjoined from requiring of non-union employees union membership as a condition precedent to employment benefits, to modification of the injunction so as to permit negotiation and adoption of union security agreements permitted, but not required, by such amendment?

5. Were petitioners precluded from obtaining a modification of the injunction by the agreed settlement, authorized by the Railway Labor Act, by all the parties, of all the issues in this case, including an agreement not to require union membership as a condition precedent to employment benefits, which agreed settlement became the decree of the court?

6. Where the original complaint alleged discrimination by petitioners against non-union employees because of refusal to join or to maintain membership

in the unions, did the District Court properly consider, as evidence of no change of factual situation, unrefuted evidence of continued and continuing bitterness and hostility between petitioners and non-union employees resulting from a strike upon the railroad's property?

7. In requesting a modification of an injunction which protects an agreement not to require union membership as a condition to employment benefits, did petitioners come into court with clean hands when undenied evidence showed bitterness and hostility between petitioners and non-union employees and threats of reprisal toward the latter by the former?

COUNTER-STATEMENT OF THE CASE.

Prior to December 7, 1945, non-union employees of the Louisville and Nashville Railroad Company employed throughout its system in the shop crafts comprising machinists, boilermakers, sheetmetal workers, carmen, electricians and stationary firemen and oilers and laborers, were the victims of discrimination in favor of union members with respect to such employment benefits as seniority, promotion, overtime and the like, because of their refusal to join, or maintain their membership in, the labor organization representing their respective craft.

Claiming that such discrimination violated rights guaranteed by the Railway Labor Act (45 U. S. C., Sec. 151, *et seq.*), twenty-eight of such employees, represent-

ing all non-union employees in the six shop crafts of said railroad, on July 16, 1945, filed against the affected shop craft unions and certain of their locals (petitioners herein) and against said railroad (respondent herein) a class action seeking a declaration of rights, an injunction against all future discrimination and monetary damages for past discrimination. (For caption of said complaint—filed in the United States District Court for the Western District of Kentucky, at Louisville—for specimen counts in said complaint, and for the prayer of the complaint, see R. 15-35.) The objectives of the suit, as shown by the allegations and prayer of the complaint, were:

1. A declaratory judgment *binding* on all parties *and their privies, settling* and declaring the *rights, interests* and *legal relations* of the parties . . .

2. A declaratory judgment decreeing that the union defendants were under a duty to represent fairly, impartially and without discrimination all employees of the carrier without regard to whether they joined or retained membership in such unions . . .

3. A declaratory judgment decreeing that such non-union employees were entitled to employment benefits irrespective of and without regard to whether they joined or retained membership in such unions . . .

4. A declaratory judgment decreeing that the defendant railroad was also under a duty to treat fairly, impartially and without discrimination all employees, irrespective of whether they were members of any of defendant unions . . .

5. A preliminary and *permanent* injunction agains defendant unions and defendant railroad, *perpetually* restraining and enjoining them from requiring union membership as a condition precedent to employment benefits, *perpetually* restraining and enjoining them from denying employment benefits because of failure to join or retain membership in defendant unions, and *perpetually* restraining and enjoining them from failing to award employment benefits because of lack of union membership . . .

6. A judgment against all defendants, jointly and severally, awarding each plaintiff (twenty-eight of them) the sum of $5,000.00.

Following the filing of the complaint below and the joining of issues, the defendants took depositions of various witnesses at several points on defendant railroad's property, after which *all* of the parties entered into a *complete settlement* of the causes of action alleged in the complaint. A release was prepared and signed by all of the plaintiffs (R. 138-144) wherein it was stated in part:

> "Whereas it is the mutual desire of all of the parties to said action to *settle* and *dispose* of *all issues* in dispute among them in the following manner:" (R. 138). (Emphasis added.)

The manner in which the settlement was to be effected was specifically set out. The parties agreed to:

> 1. The "entering of a *consent decree* . . . the purpose of which will be to protect the undersigned against *any future acts* or *practices* of or

by the defendants which will deny to the undersigned any of their rights or benefits under the collective bargaining agreements now in effect or which may hereafter be entered into in accordance with the Railway Labor Act . . . a copy of which consent decree is attached hereto" (R. 38). (Emphasis added.)

2. The "waiver and release by the undersigned of any and all claims which they now have or may hereafter assert . . . for alleged wrongful acts done prior to the date of this release" (R. 139).

3. The "payment of the sum of $5,000.00 by the defendants to the undersigned" (R. 139).

The release then recited that in consideration of $5,000.00 paid by defendants to plaintiffs, *"and the consent* of said defendants to the *entry* of a *decree* in said action, *a copy of which is attached hereto"* (emphasis added) plaintiffs released defendants from all claims and damages for conduct of defendants occurring prior to the release, the date of which is December 1, 1945 (R. 139-144).

The original consent decree entitled "Judgment, Decree and Injunction" was entered in the District Court on December 7, 1945. It was, as revealed by its opening sentence: "By consent and agreement of all parties to this action, it is ordered, adjudged and decreed as follows:", a part of the agreed settlement of December 1, 1945 (R. 36). A copy of the consent decree was attached to the written settlement and became a part thereof.

On page 6 of their brief, petitioners said: "The claims of the twenty-eight named plaintiffs for monetary damages were separately settled and not covered by the decree."

Plaintiffs' claims for monetary damages were not settled separately from the decree. It is true that the decree does not mention the monetary settlement, but both the monetary settlement *and* the consent decree were part of the same written agreed settlement of December 1, 1945, entitled "Release." The twenty-eight named plaintiffs alleged $140,000.00 in damages. If proof had disclosed more, amendments to conform would have been permitted. It is obvious that payment of $5,000.00 to twenty-eight plaintiffs is a nominal settlement from a monetary standpoint. It is equally obvious that the real consideration for the agreed settlement and release was the consent decree. Plaintiffs were familiar with the terms of the consent decree, yet to be entered, when they signed the release.

The terms of the consent decree (and of the agreed settlement) provided that non-union employees of defendant railroad, employed in its shops, shall "be entitled, irrespective and without regard to whether said employees, or any of them, are members of or join or retain their membership in any of said defendant labor organizations, or in any labor organization, to" employments benefits in accordance with collective bargaining agreeements, "as provided for in such agreements *now in effect or that may hereafter be in effect in accordance with the Railway Labor Act . . .*" (R. 37). (Emphasis added.)

The injunction, which was an integral part of the decree, enjoined the defendant unions and the defendant railroad from requiring non-union employees to join or retain membership in defendant unions as a condition precedent to receiving certain employment benefits "and any other rights or benefits which may arise out of or be in accordance with the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that *may hereafter be in effect . . . in accordance with the Railway Labor Act . . .*" (R. 37-38). (Emphasis added.) The injunction also enjoined the defendant unions and the defendant railroad from denying to non-union employees employment benefits because of non-membership in the unions, and enjoined said defendants in the application of bargaining agreements from discrimination against non-union employees because of lack of union membership. The latter two prohibitions likewise specified bargaining agreements then in effect or which might thereafter be in effect in accordance with the Railway Labor Act (R. 38).

The non-union employees of defendant railroad have been diligent in protecting their rights under the agreed settlement, the decree and the injunction. An example is the affirmance by the United States Court of Appeals for the Sixth Circuit of a decree by the District Court finding defendant unions and defendant railroad guilty of violating the injunction and punishing them for contempt. *System Federation No. 91, et al.* v. *Reed,* 180 F. 2d 991 (1950).

In 1951 Congress amended the Railway Labor Act by adding Subsection Eleventh to Section 2 (64 Stat. 1238, 45 U. S. C. 152, Eleventh) permitting carriers and unions to negotiate and make union security agreements.

On page 6 of their brief, petitioners state that this Court, in *Railway Employees' Department, AFL* v. *Hanson,* 351 U. S. 225, 100 L. Ed. 1112, upheld the validity of the amendment and agreements negotiated pursuant thereto. Petitioners' stated interpretation of the Hanson decision is entirely too broad. As shown by the opinion in that case, it was a very narrow decision holding that Nebraska's "right to work" law did not prevail over the Railway Labor Act and that a union shop agreement, *under the facts disclosed by the record in that case,* did not violate any constitutional guarantees. The applicability of the Hanson decision, therefore, to the facts in this or any other case, is not to be presumed.

On July 2, 1957, petitioners filed their motion to modify the injunction of December 7, 1945, so as to permit petitioners to demand, adopt and enforce a union shop agreement on respondent railroad's property (R. 39-43).

Petitioners had served notice only on the railroad and on counsel for plaintiffs in the original action. The District Court required service of notice on all persons whose rights might be affected by the requested modification (R. 46-47).

Thereafter, objections to modification were filed by seven of the original plaintiffs and by eight intervening employees (R. 47-50, 56-59, 61-62). In addition, two hundred and one other employees were named in Exhibit A to the intervening petition as objecting to any modification of the decree and injunction (R. 62-68).

Both the original plaintiffs and interveners objecting to modification did so in behalf of all non-union employees of respondent railroad (R. 47, 59, 62).

Objections to modification were also filed by respondent railroad (R. 51-56).

On February 3, 1958, the motion for modification, and the various objections thereto, came on for hearing before the District Court. On behalf of respondents, evidence was offered and heard relating to continued and continuing hostility on the part of petitioners and their members toward non-union employees of respondent railroad who worked during a very bitter and violent strike which occurred on the property in 1955. This evidence, from both non-union and union employees, shows bitterness and antipathy existing between petitioners and respondent employees, and threats of reprisal and harassment by the former toward the latter (R. 81-137).

Following the hearing, all parties by counsel submitted briefs. On August 7, 1958, the District Court denied the motion for modification (R. 80). His memorandum opinion appears at R. 69-80.

An appeal was duly taken to the Court of Appeals for the Sixth Circuit, briefed and argued by all parties. On December 5, 1959, judgment was entered affirming the District Court (R. 149). The *per curiam* opinion appears at R. 150-152.

On petition for certiorari, this Court granted certiorari on April 18, 1960 (R. 153).

On page 4 of their brief petitioners refer to their motion "to modify a decree of injunction entered December 7, 1945." The effect of the requested modification would be not simply a modification of the injunction, but would be a modification of the heart of the entire decree which declares that compulsory unionism would not be required as a condition precedent to employment benefits.

Petitioners also state (pages 4 and 5 of their brief) that "the requested modification would remove from the scope of the injunction's prohibitions conduct which, while unlawful when the decree was entered, has subsequently been made lawful by Act of Congress." As we see it, the requested modification would place petitioners in a position to obtain that which was unlawful when the decree was entered, is now permitted but not required by the Act of Congress, but which petitioners freely, voluntarily and expressly, and for a valuable consideration, agreed to forego, then and in the future, and to which, under the record made in this case, they are not entitled.

SUMMARY OF ARGUMENT.

A motion to vacate a judgment or modify an injunction under Rule 60 (b) is addressed to the sound legal discretion of the court and its determination will not be disturbed upon appeal except for an abuse of discretion. On the record made in this case, the District Court did not abuse its discretion in denying modification.

While a court of equity has inherent power to modify or revoke an injunction, even when based upon a consent decree, nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead a court to change what was decreed after litigation with the consent of all concerned. The District Court did not depart from this rule of law in denying modification.

The burden of proof was on petitioners to establish a legal reason or ground for their requested modification. They failed to meet this burden by showing any change in the factual situation or by showing any grievous wrong evoked by new or unforeseen conditions. Petitioners rely only upon the 1951 Amendment to the Railway Labor Act which permits, but does not require, a carrier and the bargaining representatives of its employees to adopt union security agreements.

Such an amendment to the Railway Labor Act alone was insufficient to warrant modification in this case because in a suit brought on behalf of non-union shop

craft employees for declaration of rights, for an injunction and for damages arising out of discrimination based upon non-union membership, all the parties to the litigation, including petitioners, entered into an agreed settlement of the case. The agreed settlement comprised a release of damage claims upon the payment of nominal damages in the sum of $5,000.00 and in consideration of the entry of a consent decree declaring that non-union employees in the shop crafts were entitled to employment benefits irrespective of whether they joined or maintained membership in the unions representing their crafts, and the issuance of an injunction prohibiting the denial of employment benefits because of lack of union membership, and enjoining union membership as a condition precedent to employment benefits. The declaration of rights and the injunction were both expressly related in the decree to bargaining agreements then in effect between respondent railroad and petitioners or that might thereafter be in effect between them in accordance with the Railway Labor Act. The consent decree was framed by the parties, as their agreed settlement of the litigation, not only with respect to the present but with respect to the future, thus contemplating any amendment which might thereafter be made in and to the Railway Labor Act.

The 1951 Amendment to the Railway Labor Act is permissive only and not mandatory. The agreement of the parties to forego union security agreements with respect to the shop crafts on respondent railroad was lawful when made prior to the amendment, and is

lawful today, notwithstanding the amendment. There was sufficient consideration for such agreement and the same equities which permitted the agreement exist today, there having been no change in the factual situation surrounding the parties.

The District Court properly considered evidence of bitterness and hostility between petitioners and respondent employees as showing no change in factual conditions and as demonstrating that petitioners had not changed their attitude and feelings toward, or treatment of, non-union employees. Such evidence also demonstrated that petitioners, though seeking equity, came into court with unclean hands.

Respondent employees do not assert that the injunction issued in this case as part of the agreed settlement of the litigation and as part of the consent decree can never be modified. That question is not presented to this Court in this record. We submit that under the record made in this case petitioners did not meet the burden of proof that was upon them, the District Court did not abuse its discretion, but properly denied modification of the injunction, and that the judgment of the District Court should, therefore, be affirmed.

ARGUMENT.

1. The District Court Did Not Abuse Its Discretion in Refusing to Modify the Injunction.

In seeking a modification of the injunction granted by the consent decree entered in this case on December 7, 1945, petitioners filed their motion under Rule 60 (b) (5) of the Federal Rules of Civil Procedure (see pages 14-15, petitioners' brief). Such a request was addressed to the sound discretion of the District Court. Its determination cannot constitute a substitute for appellate review of the original decree nor will the lower court's denial of modification be disturbed upon appeal except for an abuse of discretion.

Numerous cases support the view that a motion to vacate a judgment under Rule 60 (b) is addressed to the sound legal discretion of the court and that its determination will not be disturbed upon appeal except for an abuse of discretion. *Securities and Exchange Commission* v. *Farm and Home Agency, Inc.*, 270 F. 2d 891 (7th Cir.); *Morse-Starrett Products Company* v. *Steccone*, 205 F. 2d 244 (9th Cir.); *Title* v. *United States*, 263 F. 2d 28 (Cert. Den. 359 U. S. 989), (9th Cir.).

Petitioners have not demonstrated any abuse of discretion by the District Court in refusing to modify the injunction in this case, as we shall point out in subsequent sections of this brief. Suffice it to say at this point that modification of an injunction is not a matter of right, but a matter of discretion, which cannot be

reviewed unless abused. In this case the District Court properly exercised its discretion in refusing to modify the injunction, which was part of a consent decree based upon an agreed settlement of all the issues in this case, where there was a complete absence of change in factual situation and where the change was merely in the Railway Labor Act permitting, but not requiring, union security agreements, and where modification would result in grievous wrong to respondent employees rather than to petitioners.

2. The District Court Did Not Depart, in Refusing to Modify the Injunction, From the Law Enunciated by This Court.

At the outset, we concede that the District Court had authority to modify the injunction heretofore issued in this case on December 7, 1945, notwithstanding the fact that the injunction was part of a decree which was entered by consent of all parties. In the case of *United States* v. *Swift & Co.*, 286 U. S. 106, 76 L. Ed. 999, this Court has clearly enunciated the rule that a court which issues an injunction has inherent right to modify or revoke it under certain circumstances. As this Court said in the opinion in that case:

> "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent."

The injunction in this case contained a provision whereby the District Court retained control of the

action for the purpose of entering such further orders as might be deemed necessary or proper (R. 38), but, as said in the Swift opinion:

> "If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery."
>
> . . . . . .
>
> "The result is all one whether the decree has been entered after litigation or by consent . . . . In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

However, power to modify cannot be lightly employed merely because one party to a consent decree is now unhappy with the prohibitions of that decree. This Court has pointed out unequivocally in the *Swift* case that modification may be employed only where there are changed conditions or changed circumstances which turn the injunction into an instrument of wrong. This Court has written the formula thus:

> "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

The *Swift* case bears an interesting analogy to our case. In that case certain large packers were enjoined from dealing in, selling or transporting groceries. The defendants consented to the decree and the in-

junction. Ten years later, Swift and Armour sought a modification of the consent decree permitting them to sell groceries on the ground that the intervening years had brought about a change in the food industry, making it inappropriate, useless and oppressive to continue the injunction.

The lower Court granted the modification to permit the sale of groceries but this Court reversed with directions that the petition for modification be dismissed.

Speaking of the defendants in the *Swift* case, this Court said that mere size was not an offense against the Sherman Act but that:

> ". . . size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

The foregoing quotation may be aptly paraphrased in our case as follows:

> "A union shop is not now contrary to the Railway Labor Act, but a union shop carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past, even with an open shop."

In speaking of the injunction in the *Swift* case, this Court said:

> "It did not say that the privilege to deal in groceries should be withdrawn for a limited time, or until the combination in respect of meats had been effectually broken up. It said that the privilege should be ***renounced forever,*** and this whether the units within the combination were acting collectively or singly. The combination was to be dis-

integrated, but relief was not to stop with that. To curb the aggressions of the huge units that would remain, there was to be a check upon their power, even though acting independently, to wage a war of extermination against dealers weaker than themselves. We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court." (Emphasis ours.)

Again, the foregoing quotation from the *Swift* case may very well be paraphrased in our own case as follows:

> "The injunction here did not say that requiring membership in a union in order to get employment privileges should be enjoined only until the amendment of the Railway Labor Act permitting a union shop. It said that such requirements would be enjoined. We do not turn aside to inquire whether the injunction, if the case had been tried, could have been so limited. Instead, the defendants chose to consent and the injunction, right or wrong, became the judgment of the court."

3. Petitioners Did Not Meet the Burden of Proof of Showing a Grievous Wrong Evoked by New and Unforeseen Conditions.

In seeking a modification of the injunction, the burden of proof was by law laid upon petitioners to establish a legal reason or ground for such modification.

In *Ford Motor Company* v. *United States*, 335 U. S. 303, 93 L. Ed. 24, this Court reversed a modification of an injunction, stating:

> "The government has not sustained the burden of proof of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated."

In our case, where is the clear showing of grievous wrong written into the *Swift* formula? Not only have petitioners shown no grievous wrong, they have utterly failed to show any wrong. Petitioners deliberately agreed with respondents in this case and with the classes represented by respondent employees, namely, all non-union employees of respondent railroad, that union membership would not be a condition precedent to employment benefits. This agreement became the judgment of the court, to protect which the injunction was issued.

Petitioners need not have made such a far reaching agreement, for the law at that time prohibited the union shop, but make it they did. At that time there was no wrong, grievous or otherwise, in such an agreement. Today, there is no wrong, grievous or otherwise, in such an agreement, for it is just as legal today as it was when made. The amendment to the Railway Labor Act upon which petitioners rely merely permits the carrier and the unions representing its employees to adopt a union shop agreement but no compulsion is exerted by the amendment.

Petitioners argued (page 28 of their brief) that perpetuation of the injunction would deprive them of the opportunity to obtain substantial income from non-union employees of respondent railroad. It may be said with equal force that the modification of the injunction would result in loss of income to respondent employees and the classes represented by them, as they would then be compelled to pay initiation fees, dues and assessments in order to continue their employment.

Under the facts in this case, a loss of income to either the unions or the non-union employees is not an equity which can seriously affect the outcome of this case. When petitioners agreed to forego compulsory unionism as a condition of employment, they were then aware of the loss of income inherent in such an agreement. While compulsory unionism was not then permissible under the Railway Labor Act, nevertheless, as we shall point out later in this brief, petitioners had an eye to the future when a union shop would be permissible. Moreover, the consent decree and the injunction were written not only in the present tense but also in the future, as by express terms they were applicable to bargaining agreements then in existence and to bargaining agreements that might thereafter be in existence in accordance with the Railway Labor Act.

The original litigation from whence petitioners' motion to modify the injunction has arisen began because non-union employees of respondent railroad were being denied employment benefits by reason of their refusal to join or maintain membership in the unions.

The consent decree declared their rights to employment benefits without union membership. The amendment to the Railway Labor Act does not require the adoption or maintenance of union security agreements and for that reason there is nothing illegal today in the provisions of the original consent decree. The requested modification of the injunction would do far more than modify the injunction only. If such modification should be granted, petitioners would quickly compel the adoption by respondent railroad of union security agreements through the economic pressure of strikes. The result of this would be not merely a change in the injunction permitting petitioners to negotiate with respondent railroad for a union shop but would be complete emasculation of the consent decree itself so that what the non-union employees fought to obtain and did obtain would be taken from them completely. It thus follows that modification would result in grievous wrong to respondent employees and the classes represented by them and would thwart rather than effect th basic purpose of the consent decree and the injunctio .

4. The 1951 Amendment to the Railway Labor Act Alone Does Not Entitle Petitioners to Modification of the Injunction.

Petitioners' entire case is based upon the 1951 Amendment to the Railway Labor Act; that amendment which provides that any carrier and the unions duly designated and authorized to represent its em-

ployees "shall be permitted" to make union security agreements. (Act of January 10, 1951, c. 1220, 64 Stat. 1238, 45 U. S. C., Sec. 152 Eleventh.)

The gist of petitioners' argument is that since they were not allowed to have union security agreements in 1945 when the consent decree was framed and the injunction issued in this case, and since the Railway Labor Act now permits negotiation for and adoption of union security agreements, that which the parties to this case agreed upon as a settlement of their differences and which became the decree of the court should now be rewritten to allow that which the law now permits but does not require. In other words, petitioners contend that this change of law alone, in the absence of a change of facts, is sufficient to warrant modification.

If the amendment in question required a carrier and the union bargaining representatives to execute and maintain a union shop upon the carrier's property, there might be some merit to petitioners' argument. The amendment, however, is merely permissive and the carrier and the unions are left free to ignore a union shop or even agree not to have one, if they so choose.

That the words "shall be permitted" in the amendment must be interpreted as being merely permissive appears to be an inescapable conclusion. In the first place, the amendment in question merely removed a prohibition against the adoption of union security agreements which had existed theretofore in the Railway Labor Act. By no means did it make mandatory

the adoption of union security agreements. The purpose of the prohibition, which was removed by the 1951 Amendment, was to break up the company unions which had flourished prior to the 1934 Amendment, which amendment gave to all employees the right to organize and bargain collectively through representatives of their own choice, free from any pressure by or interference from the carrier, thus guaranteeing an open shop. By 1951 Congress recognized that the danger of company unions was forever past. Congress then yielded to the pressure of the unions and granted permission, through the means of voluntary bargaining, to adopt union security agreements if desired by both the carrier and the unions.

In the second place, the "permissive" interpretation is borne out by the legislative intent as gathered from the arguments of the proponents of the 1951 Amendment who were instrumental in shepherding the amendment through Congress.

In the report of the Senate Committee which conducted hearings on the amendment, it was stated:

> *"The bill would not require the execution of union shop agreements:* It merely *permits* the carriers and the representatives of their employees, through the *voluntary process of collective bargaining* to include the union shop provisions in their collective bargaining agreements." (Emphasis ours.)
>
> (Vol. 2, *U. S. Congressional Service,* 1950, pp. 4319, 4320)

In speaking for the 1951 amendment on the Senate floor, Senator Hill stated:

"I should like to emphasize that the bill *would not require and does not in any way make mandatory the execution of union-shop agreements;* it merely *permits* the carriers and the representatives of their employees, through the *voluntary process* of collective bargaining, to include a union-shop provision in their collective bargaining agreements" (Cong. Rec., Vol. 96, p. 15882). (Emphasis ours.)

. . . . . .

"The provisions of the bill are merely permissive. They do not require any railroad or labor organization to sign a contract. It *makes it permissive for management and labor to sit around the bargaining table* and, if they can work out an agreement, it is lawful for them to enter into it" (*Ibid.*, p. 16262). (Emphasis ours.)

Representative Sullivan stated:

"We are being asked to permit unions and management to make agreements regarding the union shop. We *are not being asked to vest in some Government board the authority to order union-shop agreements.* We are not being asked to set up some new authority at great expense to the Government *to administer some standards that will be set here.* We are simply proposing to say to railroad management and railroad labor—*If you fellows can get together on contracts of this sort and* want to sign one it is all right." (*Ibid.*, p. 17057). (Emphasis ours).

In the third place, courts generally have construed the word "shall" as meaning "may" when from the

general wording of the statute itself or from the obvious legislative intent, as gathered from the entire statute and the background, the meaning should be "may".

In *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, 85 L. Ed. 1089, the language of Section 3 First (i) of the Railway Labor Act, providing that disputes which fail to reach adjustment in conferences with officials of the carrier "may be referred . . . to the appropriate division of the Adjustment Board" was before this Court for interpretation. This Court's opinion pointed out that a comparable section of the 1926 Railway Labor Act had used the word "shall" rather than "may". But this Court said that substituting "may" for "shall" was not an indication of a change in policy but was instead a clarification of the law's original purpose to provide for voluntary adjustment and mediation.

In the fourth place, this Court has set at rest any question of the interpretation of the words "shall be permitted" in the 1951 Amendment. Speaking of the 1951 Amendment in *Railway Employees' Department AFL* v. *Hanson*, 351 U. S. 225, 100 L. Ed. 1112, this Court said:

> "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements."

Since the parties to this litigation agreed that union security agreements would not be the price of employ-

ment benefits, we submit that the change in the Railway Labor Act, being permissive only, is not sufficient, in the absence of any change in the factual conditions surrounding the parties, to warrant modification of the injunction. The requirement of a showing of grievous wrong enunciated in the *Swift* case has been followed by many cases.

In the case of *Western Union Telegraph Company* v. *I. B. E. W., Local Union No. 134, et al.*, 133 F. 2d 955 (7th Circuit), an injunction was issued in 1924 enjoining appellees from interfering with appellant's business by means of a secondary boycott. Subsequently, after the passage of the Norris-LaGuardia Act (which legalized many of the acts prohibited under the decree) appellees applied for a modification of the injunction. The District Court entered an order modifying the decree to conform with the Act. The Circuit Court reversed. In the opinion, the court said:

> "In the consideration of this question it is well to remember the admonition of the court in the Swift case, *supra,* 286 U. S. 119, 52 S. Ct. 460, 76 L. Ed. 999, that nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead the court to change what was decreed after years of litigation. In this connection we are permitted to examine and judicially notice the proceedings formerly had by the parties, De Bearn v. Safe Deposit & Trust Co., 233 U. S. 24, 34 S. Ct. 584, 58 L. Ed. 833. From these records it appears that there was evidence tending to prove that appellees' agents resorted to destruction of appellant's property and made threats of violence

> upon appellant's employees. It is possible that the appellees have mended their ways and have turned over a new leaf and that such a showing may be made, but it has not been made by the record in the instant case; consequently, we believe that justice would be better served if the cause were remanded to the District Court to inquire into the good faith of the appellees and whether they come into court with clean hands."

Before modification may be made, there must be a showing that such modification would serve to effectuate rather than thwart the basic purpose of the original decree. Illustrative of these cases is *Walling, etc.* v. *Harnischfeger*, 142 F. Supp. 202, where a motion to vacate and dissolve an injunction, issued under the Fair Labor Standards Act, was denied for the reason that the record did not show any substantial change in the situation except that the injunction had been complied with over a long period of time.

Speaking of modification, the court in *United States* v. *Radio Corporation of America, et al.*, 46 F. Supp. 654, said:

> "It would seem, however, that such modification must be consistent with the purpose of the original decrees and calculated to effectuate and not thwart their basic purpose. United States v. International Harvester Co., 274 U. S. 693, 702, 47 S. Ct. 748, 71 L. Ed. 1302; Chrysler Corporation v. United States, 316 U. S. 556, 62 S. Ct. 1146, 86 L. Ed. 471."

See also *Morse-Starrett Products Company* v. *Steccone*, 205 F. 2d 244 (9th Circuit), in which the appellee was enjoined from using a trade-name except in a certain manner. Twenty-two months after the entry of the original judgment a motion was made to modify the injunction under rule 60(b), Rules of Civil Procedure. The motion was denied by the District Court, which action was affirmed by the Court of Appeals. The opinion referred to the *Swift* case, pointing out that the court was to keep in mind that it was not framing a decree but was to inquire whether anything had happened to justify changing the decree. The court said:

> "In the instant case there has been no adequate showing either that changed conditions make continuation of the injunction inequitable or that operation of the injunction cannot have the intended effect."

The appellee in the above case contended that rule 60(b)(6) was intended to broaden the power of federal courts to give relief from judgments, and that, therefore, the principle of the *Swift* case was no longer applicable. The court rejected this theory saying:

> "The provisions of rule 60(b)(6) were not intended to benefit the unsuccessful litigant who long after the time during which an appeal from a final judgment could have been perfected first seeks to express his dissatisfaction. The procedure provided by rule 60(b) is not a substitute for an appeal."

A court is not permitted to act as a court of review under the guise of entertaining a motion to modify an original decree. Of course, no appeal was or could have been taken in our case in view of the consent nature of the decree. In our case there has been no change in the surrounding circumstances or the basic facts out of which the original decree arose. The uncontradicted evidence taken by the plaintiffs at the hearing below (R. 81-137) clearly indicates the rough treatment and abuse that are in store for the non-union employees of the railroad once a union shop is in effect upon appellee railroad's property. We believe it a reasonable inference drawn from the entire record in this case that if the injunction is modified, a union shop will be in effect upon appellee railroad within a short time, for while the non-union employees of the railroad undoubtedly will resist a union shop as long as they are able to oppose it, yet it cannot be expected that a carrier would resist for long the economic pressure of a strike.

Petitioners do not claim any change in the underlying facts or surrounding circumstances out of which the original decree arose. The only reason advanced by them for the modification is a change in the law, which as we have pointed out above is permissive in its nature and not mandatory.

Illustrative of the point that a change in law in the absence of a change of fact is insufficient for the modification of an injunction and that the court cannot act as a court of review under the guise of modifying an injunction is the case of *Degenhart* v. *Harford,* 59 Ohio

App. 552, 18 N. E. 2d 990. There the defendant was restrained from maintaining and operating a funeral home in a residential district upon two grounds; namely, that the maintenance of the home (1) was a nuisance and (2) was forbidden by a city ordinance. The court held that a subsequent change in the Zoning Ordinance permitting funeral homes within residential districts did not justify a modification of the injunction, on the ground that the original ordinance was "not the basis for the conclusion that the operation constituted a nuisance", the court adding:

> "Were we to modify the injunction based upon this finding and decree, we would be in effect, acting as a court of review upon the decree of the Court of Appeals of Clark County, and in effect reversing the legal conclusion of that court upon a state of facts which has not been changed. This we are not permitted by law to do."

The question of whether a change in law would warrant a modification of an injunction was squarely presented to the court in the case of *Sunbeam Corporation* v. *Charles Appliances, Inc.*, 119 F. Supp. 492, where a motion by a dealer to vacate an injunction issued under the Fair Trade Law was denied, notwithstanding that the consent decree was issued prior to the decision of this Court holding that the Miller-Tydings Act did not apply to non-signers to price-fixing agreements. The court said:

> "The mere change in decisional law upon which a permanent injunction was granted, in and of itself will not support the opening or modification

of the decree. The circumstances and situation of the parties must so have changed as to make it equitable to do so. This indispensable ingredient is lacking in the case at bar."

It was lacking in the *Sunbeam* case because the McGuire Act was enacted to overcome the effect of the Schwegmann decision. In our case, the indispensable ingredient is lacking because the circumstances and situation of the parties have not changed so as to make it equitable to modify the decree. The change in the decisional law permitting negotiation for union security has not, of itself, brought about a change in the circumstances which either assure complete protection to all employees or which will guarantee in the future that certain employees will not be mistreated within the unions after becoming members thereof.

Petitioners have cited no cases which, upon careful analysis, are found to hold that change of law alone is sufficient to warrant modification of an injunction. We will discuss the cases cited by them.

In *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421, 18 How. 421, 15 L. Ed. 435 (page 17, brief), the basis for the subsequent dissolution of the injunction was not the change of any statutory law in existence at the time the injunction was granted. It was merely a declaration by Congress that the bridge in question did not interfere with navigation, a fact which was true at the time the injunction was issued as well as at the time the injunction was dissolved. There was no change in factual circumstances. The bridge had never been an

obstruction to navigation and the injunction should not have been issued in the first place.

In *Western Union Telegraph Co.* v. *International Brotherhood, Etc.*, 133 F. 2d 955 (page 17, brief), the plaintiff obtained an injunction enjoining defendants from interfering, through a secondary boycott, with plaintiff's business. The Court of Appeals affirmed because it was believed that the conduct by the defendant was prohibited by the Sherman Act. Subsequently, the Norris-LaGuardia Act was passed. The defendants then filed their petition for modification of the injunction and the modification was granted by the lower court.

The Court of Appeals reversed with directions to the trial court to hear evidence to determine whether the defendants had mended their ways. A reading of the opinion clearly demonstrates that the right to modification was not based upon the passage of the Norris-LaGuardia Act but on the decisions of this Court, handed down since the injunction was issued originally, holding that such activities as were enjoined were not in restraint of interstate commerce or violative of the Sherman Act. As the court said in its opinion:

> ". . . we are impelled to the conclusion under the circumstances here appearing, that the appellant cannot invoke the Sherman Act as a basis for injunctive relief."

There again we find a situation where the acts complained of were not contrary to law, as the court

had originally believed. It was not a change in any statutory law.

In *Ladner* v. *Siegel,* 298 Pa. 487, 148 Atl. 699, 68 A. L. R. 1172 (page 17, brief), there was involved the use and operation of a storage garage in an exclusively residential area. The court granted an injunction prohibiting the use of the garage as a public garage. Subsequently, the injunction was violated and the owners were adjudged in contempt. The defendants then sought a modification of the injunction permitting the use of the garage building for the storage of automobiles by tenants of nearby apartment houses. The court granted the modification, which was affirmed by the Pennsylvania Supreme Court.

However, the Pennsylvania court did not approve the modification of the injunction upon the ground of statutory change alone. The court, in the opinion, set out the formula for a modification of the injunction. We quote herein:

> "The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made, (a) if, in its discretion judically exercised, it believes the ends of justice would be served by a modification, *and* (b) where the law, common or statutory, has changed, been modified or extended, *and* (c) where there is a change in the controlling facts on which the injunction rested." (Emphasis added.)

It should be noticed that the conjunction "and" appears between (a) and (b) and between (b) and (c) in the quotation above appearing. Thus we see that

what the Pennsylvania court said is that modification of a decree *may be made* if the ends of justice would be served *and* where the law has been changed *and* where there is a change in the controlling facts on which the injunction rested. The single factor which more than anything else influenced the court in the *Ladner* case was a finding of a change in the controlling factual background, namely, that the residential district, in which so many apartment houses, hotels, schools and clubs were in use, was no longer so exclusively residential as to make the use of a storage garage a nuisance *per se*. Referring to the formula quoted above, the court said:

> "It becomes apparent that the second and third reasons amply justify a modification of the decree, if there is nothing else to prevent it." *

In *Santa Rita Oil Co.* v. *State Board of Equalization,* 112 Mont. 359, 116 P. 2d 1012, 136 A. L. R. 757 (page 18, brief), there was involved an injunction issued by the Montana Supreme Court in an original proceeding restraining the assumption, levy and collection of state taxes on oil and gas production under a lease of trust patent Indian land on the ground of interference with a federal instrumentality. Upon application by the defendant, the decree was modified.

Originally the court enjoined the assumption, levy and collection of the tax because the lessee was an instrumentality of the federal government and such taxes interfered with governmental functions. The original injunction was issued upon the basis of the

decision by this Court in certain cases holding that lessees of Indian trust patent land were instrumentalities of the federal government. Subsequently, this Court overruled these decisions (which the Montana court had followed) holding that the tax upon the instrumentality did not under the circumstances constitute an interference with governmental functions.

In the *Santa Rita* opinion, the Montana court said:

> "It is a federal question whether these taxes constitute such an interference with the federal instrumentality as to be void and that question is now answered by the federal courts in the negative. Their decision on the point is binding upon this court."

The point is, the original injunction was issued because this Court had then said that the taxes in question would interfere with the governmental function. When this Court later confessed its error and held that such taxes did not interfere with governmental function, the Montana court properly modified its original injunction. In essence, this was a change of factual background or situation and not a mere change of law. Whether or not taxes interfered with governmental function, while decided as a matter of law, is nevertheless actually a matter of fact. When the interference no longer existed, equitable considerations would compel the modification of the injunction.

The case of *National Electric Service Corporation* v. *District 50, United Mine Workers of America* (Ky.), 279 S. W. 2d 808 (page 20, brief), involved

an injunction issued by the Harlan Circuit Court enjoining picketing for the purpose of coercing plaintiff's employees in joining the defendant union. The jurisdiction of the court was challenged upon the ground that the acts complained of constituted an unfair labor practice, of which the National Labor Relations Board had exclusive jurisdiction under the Labor Management Relations Act of 1957. The lower court overruled the objection and the Court of Appeals refused to dissolve the injunction.

Subsequently, this Court handed down a decision in *Garner* v. *Teamsters, Etc., Union,* 346 U. S. 485, 98 L. Ed. 228, which held that a state may not enjoin, under its own labor statute, conduct which had been made an unfair labor practice under the federal statutes. Following this decision, the defendant in the *National Electric Service Corporation* case moved the court to vacate the injunction, which motion was sustained by the lower court and affirmed by the Court of Appeals.

The crux of the case is that the Kentucky court had no jurisdiction to issue the injunction in the first place because the Labor Management Relations Act conferred exclusive jurisdiction on the National Labor Relations Board. There was no change in the Act subsequent to the issuing of the injunction. It remained the same. The basis for the vacation of the injunction was the pronouncement by this Court that the state court had no jurisdiction.

5. Petitioners Are Precluded From Obtaining a Modification of the Injunction Because of the Agreed Settlement by All the Parties of All the Issues in This Case, a Settlement Authorized by the Railway Labor Act, Then and Now.

Petitioners argue that an injunction is simply a remedy for the protection of a legal right but is not the source of the right. From this, they argue that when the legal right which formed the basis for the injunction is changed or terminated, the injunction should be accordingly modified or vacated. We agree with the premise that the injunction is a remedy and not the source of the right. We do not agree that *any* change in the legal right which formed the basis for the injunction warrants modification.

We concede that our complaint was predicated upon discrimination which was prohibited by the Railway Labor Act, and because of such prohibition, the District Court had jurisdiction to grant an injunction notwithstanding the *Norris-LaGuardia Act*. The Railway Labor Act made such discrimination unlawful and the court, therefore, had authority to enjoin the continuance or repetition of such discrimination.* The injunction was not issued in this case because the Railway Labor Act did or did not permit the carrier and the bargaining representatives to adopt a union shop, but because the Act forbade discrimination.

Steele v. *Louisville and Nashville Railroad Company*, 323 U. S. 192, 89 L. Ed. 173.

As stated by the District Court in its opinion (R. 79-80):

> "It is to be remembered that the provisions of the Railway Labor Act made illegal a union shop in 1945, when the injunction was agreed upon. Hence, it was then unnecessary for the railroad and the unions to agree, as they did, that the non-union members should not then be required to join or maintain membership in any of their craft unions as a condition precedent to employment. The law so prohibited, Section 152, Fourth and Fifth, Title 45, United States Code, Railway Labor Act. The railroad and unions went further to provide by their agreement that no such requirement of union membership should thereafter be in effect in any bargaining agreement in accordance with the provisions of the Railway Labor Act. The 1951 amendment to the Act did no more than make negotiations for a union shop permissive, Railway Employees' Dept. v. Hanson, *supra*. The amendment did not nullify the agreement or the injunction. It did not prohibit an agreement between the railroad and the unions that a union shop should not exist. Hence, the Court leaves the parties as they agreed to be and to remain."

We do not deny that our basic rights sprang from the Railway Labor Act but we continue to assert that the consent decree entered in this case, while it was lawful under the Railway Labor Act as it then existed and while it had its roots in the Railway Labor Act, nevertheless arose from the agreement entered into by the parties for the purpose of settling the litigation.

That agreement, lawful when it was made, did not become illegal by the amendment. As the District Court correctly pointed out, the amendment did not nullify the agreement or the injunction and the agreement remains lawful today.

To illustrate this point, suppose this case had not been filed prior to the amendment to the Railway Labor Act. Suppose discrimination by the bargaining representatives against non-union employees because of non-union membership (the open shop being in effect upon respondent railroad's property) existed today. Suppose further, the non-union employees filed suit for declaration of rights and an injunction. Under the terms of the Railway Labor Act, in the absence of a union shop, such plaintiffs would be entitled to the same relief to which the original plaintiffs in this case were entitled. Under such supposed state of facts, the parties could lawfully agree that union membership would not be required as a condition precedent to employment benefits. We need not speculate whether the parties would agree to such, but the right to do it exists today. Therefore, the amendment has not basically changed the picture nor entitled petitioners to modification. The agreement which the parties to this case did make and which became the basis for the consent decree is, therefore, important.

The twenty-eight plaintiffs named in the complaint alleged discrimination against them and the classes represented by them. Each of the twenty-eight plaintiffs alleged damages as a result of employment benefits already lost due to such discrimination. Each of the

twenty-eight plaintiffs sought to recover at least the sum of $5,000.00 for such damages. Had a greater sum in damages been proven, doubtless amendments to conform to the proof would have been permitted.

The defendants in the original complaint had every opportunity to investigate the charges and to evaluate not only the character and quantity of the relief sought by the plaintiffs but also their chances of obtaining it. After utilizing the process of discovery depositions to aid them in this evaluation, a settlement was suggested and all the parties to this litigation agreed upon a settlement of all the issues therein. It cannot be denied that the parties settled the entire controversy, providing for the future protection of plaintiffs and the classes represented by them (non-union employees in the shop crafts), that union membership would not be required as a condition precedent to employment benefits and providing also a nominal settlement in the amount of $5,000.00 for all of the damages claimed by all of the plaintiffs.

It must be remembered that this case was not submitted to the District Court for judgment and the District Court did not determine the rights of the parties or resolve the controversy existing among them independently of the agreement of the parties. Since the District Court did not determine the issues joined, the consent decree necessarily had to be based on something. It could not have materialized out of thin air or cosmic dust. What gave it birth was the agreement of the parties and this agreement was that no membership in the unions would be required for employment

benefits. This agreement was permitted by and was effective under the Railway Labor Act as it then existed. It is permitted by and is effective under the Railway Labor Act as it now has been amended.

It should also be remembered that the unions agreed *with* the non-union employees and not *for* them that union membership would not be required as a condition to employment benefits. Thus it is apparent that such an agreement was not a collective bargaining agreement but was a settlement of the litigation then existing.

As a matter of fact the release signed by all the named plaintiffs at the time of the settlement (R. 138-144) is dated December 1, 1945. It refers to the settlement "of all issues in dispute" by the "entering of a consent decree in the aforesaid action, the purpose of which will be to protect the undersigned against any future acts or practices of or by the defendants which will deny to the undersigned any of their rights and benefits now in effect or which may hereafter be entered into in accordance with the Railway Labor Act by and between the L. & N. Railroad Company and System Federation No. 91, *a copy of which consent decree is attached hereto*" (R. 138, emphasis added).

The terms of the consent decree were known to the plaintiffs when the release of December 1, 1945, was executed by them. Furthermore, the consideration of the release was stated to be, in part, "the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto . . . ." (R. 139).

The consent decree was entered on December 7, 1945, but the parties to the litigation had theretofore agreed upon the terms and provisions of the consent decree. It was this agreement, permitted by the Railway Labor Act, which furnished the foundation for the consent decree, to protect which the injunction was issued.

The change in the Railway Labor Act, as we have heretofore argued, had no effect upon the agreement of the parties that union membership would not be a condition to employment benefits. Petitioners argue (page 12, brief) that the decree which was entered in 1945 was a judgment defining the "then existing rights and obligations of the parties under the Railway Labor Act . . ." Apparently petitioners are unable to see this consent decree in the proper perspective for it not only defined existing rights but future rights of the parties *under the Railway Labor Act*. An examination of the consent decree (R. 36-39) reveals that both its declaratory and injunctive phases are expressly tied to bargaining agreements then in effect "or that may hereafter" be in effect in accordance with the Railway Labor Act. It is quite clear that the parties contemplated that to whatever extent the Railway Labor Act might in the future be amended, nevertheless as far as the rights of the parties to this action were concerned, including the classes represented by them, union membership would not be required as a condition precedent to employment benefits.

Petitioners and their counsel were well aware at the time of the agreed settlement of this litigation and

of the framing of the consent decree that at any time Congress could, and probably would, amend the Railway Labor Act to permit union security agreements. They were well aware that the railroad brotherhoods could, and probably would, exert pressure on Congress to permit the execution of such agreements.

Even under the Railway Labor Act as it existed at the time of the consent decree, and some two years prior thereto, petitioners had demanded of respondent railroad and other carriers a union shop agreement for the crafts involved in this case. Before the consent decree was written, petitioners were trying to obtain a union shop agreement upon respondent railroad. The demand was serious enough to require its submission, under the provisions of Section 10 of the Railway Labor Act (45 U. S. C., Section 160), to the National Railway Labor Panel Emergency Board in the year 1943. The case, designated as Case No. A-1350, went through the processes under the Railway Labor Act of negotiation and mediation through the National Mediation Board. (Records of the National Mediation Board: Transcript of Proceedings of the National Railway Labor Panel Emergency Board—Union Shop and Wage Increase Case—Book I, page 9.)

Petitioners were represented in that case by Frank L. Mulholland, Clarence M. Mulholland and Willard H. McEwen, of the same firm now of counsel for petitioners in our case. In fact, Mr. McEwen who appeared for petitioners in the union shop dispute before the Emergency Board was one of counsel for peti-

tioners in this case who attended the taking of depositions of various witnesses prior to the agreement among the parties which resulted in the consent decree.

In their brief before the Emergency Board on the union shop proposal, counsel for the unions argued that a union shop was legal under the Railway Labor Act as it then existed. (Transcript of Proceedings of the National Railway Labor Panel Emergency Board, Book II, pages 1972-1981.)

Furthermore, counsel for the unions in that case stated:

> "We find nothing in the Railway Labor Act which prevents such a board from recommending that the Act itself be amended if such a procedure appears to be the most feasible method of settling the dispute in question. We have called the Board's attention to the fact that the emergency war powers of the President are such that he might by executive order or otherwise establish a union shop in this industry" (*ibid,* page 1980).

The decision of the Emergency Board, reported to the President on May 24th and 29th, 1943, comprises "Report To The President By The Emergency Board" and appears in Book II, *supra,* pages 2085-2095, and "Supplemental Report To The President By The Emergency Board" appearing in Book II, *supra,* pages 2097-2167.

The Supplemental Report Of The Emergency Board, in reporting on the background of the dispute, set out the notices served on the carriers by the Co-

operating Railway Labor Organizations. In part, said notice read as follows:

> "Please accept this as formal notice, served in accordance with the Railway Labor Act as amended of our desire to execute an agreement as hereinafter stated and to increase all rates of pay for all employees we represent as hereinafter stated, effective October 25, 1942.
>
> "We propose that you agree: that all employees represented by this organization and who are eligible to membership in this organization shall become members in good standing of this organization within 60 days from the date this proposal is accepted and made effective and shall remain members in good standing of this organization as a condition precedent to continued employment; provided that these conditions shall apply to employees hired after date they are effective, but these employees will be allowed a period of 90 days from the date hired to secure such membership" (Book II, *supra,* page 2106).

In its decision the Emergency Board did not approve the union shop proposal (Book II, *supra,* page 2118). The Emergency Board, therefore, recommended that the union shop request be withdrawn by the Cooperating Labor Organizations (Book II, *supra,* page 2166).

This Court has the authority to take judicial notice of the decision of the Emergency Board to which we refer above. See *Bowles* v. *United States,* 319 U. S. 33, 87 L. Ed. 1194, in which this Court noted that it took judicial notice of a decision of the Director of Selec-

tive Service. The National Railway Labor Panel Emergency Board being authorized by Section 10 of the Railway Labor Act and having been established pursuant to executive orders of the President of the United States and of the Chairman of the Board (Book II, *supra,* pages 2167-2173), its decisions are likewise subject to judicial notice by the Courts of the United States.

Thus it appears that some two years before the entry of the consent decree in our case the unions involved therein made a determined effort to obtain a union shop agreement upon respondent railroad. It cannot be said, therefore, that when the consent decree was drafted, petitioners did not contemplate a continuing effort to obtain a union shop upon the respondent railroad's property. Nevertheless, the decree made no provisions for a change in the event a union shop agreement would become permissible. The agreement contained neither a limitation as to time nor as to future amendments to the Railway Labor Act which would permit a union shop agreement.

In settling all the issues in this case, the original plaintiffs gave up their rights to recover substantial damages and agreed to receive only nominal damages in consideration of a consent decree which gave to them and the classes represented by them the right to employment benefits without requiring union membership.

General considerations of equity will not suffer respondent employees to be put in a position which they occupied prior to the issuance of the injunction, but with none of the rights they then had to compel

petitioners to pay damages sustained at their hands. A modification of the injunction as desired by petitioners would deprive respondent employees of the right to rely upon a settlement effected when each side gave up something of value in order to agree on the consent decree. The respondent employees gave up their right to prove adequate damages. Petitioners gave up their right to continue requiring union membership as a condition precedent to employment benefits.

Petitioners argue (page 11, brief) that they stand "perpetually enjoined" from seeking the benefits of union security agreements and that a denial of the requested modification will maintain an everlasting prohibition against what Congress has said shall be permitted.

While we believe that the agreed settlement is just what it purports to be—an agreement by all the parties to this litigation that non-union shop craft employees on respondent railroad will never be required to join or maintain membership in the shop craft unions as a condition precedent to employment, yet we do not assert or contend that under no circumstances could the injunction in this case ever be modified. We have tried to be completely candid in our presentation of this matter to this Court. We have hereinabove conceded that courts of equity have inherent and continuing power to modify or revoke their injunctions, provided legal and compelling reasons exist. In view of that concession we cannot, and do not, categorically state that the injunction in this case could *never* be modified.

We submit that the question of whether the injunction issued in this case could *ever* be modified in the future is not the question to be decided by this Court at this time. The sole question before this Court now is whether the District Court abused its discretion in denying the modification in the light of the showing made by the record in this case. We submit that under the record in this case, now before this Court, there has been no abuse of discretion by the District Court, that there has been no showing by petitioners that they are entitled to modification of the injunction, that they have not met the burden of proof imposed upon them in this matter, and that the decisions of both the District Court and the Court of Appeals should, therefore, be affirmed.

6. The District Court Properly Considered Evidence of Continued Bitterness and Hostility Between Petitioners and Non-Union Employees.

Petitioners argue that the District Court erred in relying upon evidence of hostility and bitterness between petitioners and non-union employees arising out of the 1955 strike which occurred upon respondent railroad's property as showing that there had been no change in the circumstances giving rise to the injunction. They argue that evidence of such bitterness and hostility introduced by respondents (unrefuted by petitioners) was irrelevant (pages 25-28, brief).

While the District Court did consider undenied evidence of hostility and bitterness, he said: "The ex-

istence or non-existence of animosity, hostility or bitterness is not decisive of the question involved on the pending motion" (R. 79).

However, the District Court, referring to statements by counsel for petitioners that any threats or reprisal on the part of the unions toward employees who worked during the 1955 strike could be avoided by suitable provisions in the order of modification, stated that the Court could not undertake supervision of the conduct of the unions and their affairs among their own membership (R. 79). The unrefuted evidence of hostility and bitterness introduced at the hearing below on behalf of respondents is clearly relevant for the purpose of showing that there still exists the same attitude on the part of the unions toward non-union members—the attitude of animosity and bitterness which spawned the discrimination resulting in the original litigation. The evidence was relevant for the purpose of showing no change in background or factual situation and of showing that petitioners, feeling toward non-union employees as they have always done, have not changed to the point where modification of the injunction is warranted. Courts, from the proven experience of mankind, may make all reasonable and logical inferences from proven facts. If the requested modification of the injunction in this case be granted, a union shop will be forced upon respondent railroad, and respondent employees who are the objects of ill will upon the part of petitioners will be taken into membership and thereafter subjected to all manner of indignities and harassment, against which what would

remain of the decree and injunction would be powerless to protect.

A reading of the evidence heard at the trial (R. 81-137) not only shows the physical violence and indignities suffered by non-union employees who worked during the 1955 strike but brings to light the threats of reprisal made by petitioners to these employees. Illustrative of such reprisal is the testimony of Simon Durant. He was told that "as soon as this injunction is *mortified,* we will get all the scabs . . ." (R. 91).

W. S. Scholl, Director of Personnel of respondent railroad, testified that over the entire L. & N. system about 40% of the employees in the shop crafts worked during the 1955 strike. After the strike an agreement was executed by the carrier and the shop craft unions which contained this paragraph: "All employees will be restored to service without prejudice or reprisal and with all seniority and all other rights unimpaired including all rights under group or other insurance plans" (R. 128). Notwithstanding the agreement, the violence and indignities suffered by the employees who worked during the strike and the threats made against them, as disclosed by the evidence in this case, occurred *after* the strike had ended . Mr. Scholl testified that notwithstanding the no-reprisal agreement, he had received numerous complaints from many employees of abuses and indignities suffered because they had worked during the 1955 strike and it was necessary for the railroad to maintain special police. On the date of the hearing (February 3, 1958) it was still neces-

sary to maintain special police at two terminals on respondent railroad (R. 129-130).

The evidence in the record in this case further demonstrates the failure on the part of petitioners to meet the burden of proof required to warrant a modification of the injunction.

In *Western Union Tel. Co.* v. *International Brotherhood, Etc.*, 133 F. 2d 955, it appeared from the records in another case involving the same parties that appellees, through their agents, had resorted to destruction of appellant's property and made threats of violence upon appellant's employees. Said the Court:

> "It is possible that the appellees have mended their ways and have turned over a new leaf and that such a showing may be made, but it has not been made by the record in the instant case; consequently, we believe that justice would be better served if the case were remanded to the District Court to inquire into the good faith of the appellees whether they come into court with clean hands."

The District Court cannot be required to police the treatment of former non-union members by the unions after a union shop is in effect. One would be naive indeed, in view of the bitterness now existing between union and non-union employees, to believe that once a union shop were in effect, there would be no mistreatment by the unions of non-union employees. With the burden on petitioners, it is not required of respondents to blueprint the manner in which mistreatment may be carried out. It is sufficient to show

bitterness, hostility and threats existing between petitioners and respondent employees. As long as such a climate prevails, the equities of the case demand that the parties be left as they are.

7. Petitioners Do Not Come Into Court With Clean Hands.

The evidence introduced on behalf of respondent employees at the hearing on the requested modification, discussed in the previous section of this brief, demonstrated quite clearly that petitioners did not come into court with clean hands. Petitioners came into equity seeking equitable relief in the form of a modification of a consent decree. One requirement under the *Swift* formula is that the requested modification must promote equity. But petitioners cannot seek or promote equity when they come into court with unclean hands. No principle of law is more firmly embedded in our jurisprudence than that which prescribes that he who seeks equity must do equity and he who comes into equity must come with clean hands. As the Kentucky Court of Appeals said in *Barrowman Coal Corporation, et al.*, v. *Kentland Coal & Coke Co., et al.*, 302 Ky. 803, 196 S. W. 2d 428 (433):

> "It is he who 'comes' and he who 'seeks' affirmative relief who is denied it when he is himself guilty of inequitable or unconscionable conduct in relation to the transaction."

In *Precision Instrument Manufacturing Company* v. *Automotive Maintenance Machinery Company*, 324

U. S. 806, 89 L. Ed. 1381, speaking of the doctrine of clean hands, this Court said (814):

> "This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This pre-supposes a refusal on its part to be 'the abettor of iniquity.' Bein v. Heath, 6 How. (U. S.) 228, 247, 12 L. Ed. 416, 424. Thus while 'equity does not demand that its suitors shall have led blameless lives,' Loughran v. Loughran, 292 U. S. 216, 229, 78 L. Ed. 1219, 1226, 54 S. Ct. 684, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U. S. 240, 245, 78 L. Ed. 293, 296, 54 S. Ct. 146; Johnson v. Yellow Cab Transit Co., 321 U. S. 383, 387, 88 L. Ed. 814, 818, 64 S. Ct. 622; 2 Pomeroy, Equity Jurisprudence, 5th Ed. Secs. 397-399.
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> . . . . . .
>
> "Accordingly, one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor."

"Clean hands" is a necessary element in obtaining a modification. See *Western Union Telegraph Company* v. *International Brotherhood*, etc., *supra*, where the court pointed out that the record did not show that appellees had mended their ways and where the Court of Appeals for the Seventh Circuit remanded the case to the District Court "to inquire into the good faith of the appellees and whether they come into court with clean hands."

CONCLUSION.

For the foregoing reasons respondents other than Louisville and Nashville Railroad Company submit that the judgment below was proper and in accord with law and should be affirmed, that they have their costs herein expended and such other relief as this Court may deem proper.

Respectfully submitted,

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PROOF OF SERVICE.

I, Marshall P. Eldred, attorney for respondents other than Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 21, day of September, 1960, I served copies of the foregoing Brief for Respondents Other Than Louisville and Nashville Railroad Company on the several parties hereto as follows:

1. On petitioners by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record as follows:

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2. On respondent, Louisville and Nashville Railroad Company, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record as follows:

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